INTRODUCTION

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This special edition of the journal Human Rights and International Legal Discourse is devoted to reviewing contemporary practice on the relationship between international humanitarian law (IHL) and international human rights law (IHRL). The special edition has been prepared in appreciation of the fact that in the immediate years following the Wall Opinion from the ICJ,[1] there was a wealth of articles concentrating on the relationship between the two bodies of law by mapping their respective parameters, histories and philosophies.[2] Successive articles were devoted to clarifying the meaning of the term *lex specialis* and authors disagreed as to its ability to resolve potential conflicts between IHL and IHRL. In the last few years, literature addressing the relationship between IHRL and IHL has become notably less generalised, with authors increasingly analysing how the bodies of law interact in the context of specific or newly forming normative situations, such as detention or targeting.[3] Also in the

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1 ICJ 9 July 2004, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm (visited on 10 April 2018).

2 See, for example, H. Krieger, A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study, 11(2) Journal of Conflict and Security Law 265–291 (2006); C. Droege, The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict, 40(2) Israel Law Review 310–355 (2007); N. Prud'homme, Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?, 40(2) Israel Law Review 359–395 (2007); N. Lubell, Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate, 40(2) Israel Law Review 648–660 (2007); W. Schabas, Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum, 40(2) Israel Law Review 592–613 (2007); M. Milanovic, A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law, 14(3) Journal of Conflict and Security Law 459–483 (2009).

3 See, for example, S. Aughey and A. Sari, Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence, 91 International Legal Studies 60–118 (2015); A. Clapham, Detention by Armed Groups under International Law, 93 International Legal Studies 1–44 (2017); R. Goodman, The Power to Kill or Capture Enemy Combatants, 24(3) European Journal of International Law 819–853 (2013); L. Hill-Cawthorne, Detention in Non-International Armed Conflict (Oxford, OUP, 2016).

last few years, it is notable that scenarios involving potential norm conflicts that had previously been the subject of academic speculation have been dealt with by various courts and tribunals. It is against that backdrop that this edition seeks to revisit the relationship between IHRL and IHL from theoretical, operational, international criminal law and practical perspectives. By viewing the problem from multiple perspectives, this edition seeks to capture the 'state of play' on a debate which has moved on considerably since it was last addressed in academic literature in a single issue of a journal.[4] By seeking to pin down modern perspectives on the relationship between IHL and IHRL, the edition seeks to take the debate further, clarify best practices and identify areas of consensus, but also to look at the future and ask new questions, identify new problems and pose new challenges.

Considering this journal is devoted to an exploration of international legal discourse, it seems appropriate that the first headline article, by Andrew Clapham, begins by exploring the language that has been used to explain the relationship between human rights law and the law of armed conflict. In an engaging review of the amatory and other metaphors that have been used to describe this relationship, Clapham shows how it is not only the bodies of law that have struggled to exist harmoniously, but at times also the practitioners and lawyers that work with(in) them. Implicit in Clapham's review is a serious point that discourses which fuel an atmosphere of mutual suspicion between lawyers distract from the serious business of figuring out how the two bodies of law can be applied alongside each other, in an operational sense. In the second half of his article, Clapham identifies several initiatives that demonstrate that the project of what he terms the 'interoperability' between the two bodies of law is well underway. He shows that at the level of practice, arguments about which regime is most fitting for a particular situation have been largely displaced by more finely grained operational approaches that pay attention to individual norms, individual incidents and the specificities of both bodies of law. Further fine-grained research into the practical application of IHL/IHRL on a micro-operational level might indeed cast an interesting light on the theoretical debate at the macro-academic level.

In the second headline article of the issue, we asked Jean-Marie Henckaerts and Ellen Nohle to update an article the first author wrote in the very first edition of this journal in 2007.[5] At the heart of Henckaerts and Nohle's analysis is an evaluation of how different human rights courts and bodies have been forced to walk a tightrope between pragmatism and principle, finding ways to accommodate international humanitarian norms in a manner that does not dilute or reduce human rights protections. In addition to helpfully tracking how the relationship between IHRL and

4 See 40(2) Israel Law Review 2007, with D. Kretzmer, R. Giladi and Y. Shany as special editors.

5 J.-M. Henckaerts, Concurrent Application of International Human Rights Law and International Humanitarian Law: Victims in Search of a Forum, 1(1) Human Rights & International Legal Discourse 95–124 (2007).

IHL has developed in the intervening years, their article identifies three key uncertainties that remain regarding (i) the material and temporal, (ii) personal and (iii) geographical scope of the application of human rights law. It is no coincidence that it is largely aspects of these three uncertainties that are picked up and developed by the other authors in this issue, with Rogier Bartels's and Deborah Casalin's and Peter Vedel Kessing's contributions addressing the substantial/material division between IHRL and IHL, the article by Ka Lok Yip focusing on jurisdiction and IHRL and the article by Ezequiel Heffes and Annyssa Bellal investigating armed groups.

In his article, Rogier Bartels takes the discussion into the field of international criminal law, arguing that the dichotomy between IHRL and IHL is translated into the relationship between crimes against humanity and war crimes. The author concentrates on the basic contextual and structural differences between crimes against humanity and war crimes, and indicates that, given their differential background, the partial overlap that exists between crimes against humanity and war crimes creates a tension in international criminal law. Interestingly, the particular focus of the article is put on the interplay between the substantive laws underlying the crimes and the impact that this interaction has on these laws. He cautions that unlimited application of, in particular, crimes against humanity to the behaviour of combatants and fighters during an armed conflict may lead to situations in which international criminal law criminalises certain conduct on the basis of, in essence, IHRL, whereas the same conduct might be justifiable and legal behaviour under IHL. As a result, the author argues for a clearer separation between the two legal frameworks, in particular also to preserve their different functioning. The author builds on the basic assertion that IHL is the main source for war crimes whereas IHRL first and foremost underlies crimes against humanity. The reader is therefore left wondering whether indeed the international tribunals and courts have relied systematically more on human rights-based instruments as related to crimes against humanity than when dealing with war crimes, and whether or not this has led to differing interpretations of perhaps similar acts. Most importantly – be the answer affirmative or negative – one wonders whether the argument put forward in this contribution could/would/should have then led to a different outcome.

The key words in Deborah Casalin's article are 'conflict-driven displacement'. The basic starting point of her contribution is the limited legal protection IHL offers in cases of displacement, as it is regarded as an inevitable side-effect of armed conflict, notwithstanding its humanitarian impact. The author wants to establish whether in customary IHRL principles are further developed to fill these gaps and offer more legal protection. In particular, the author wonders whether there is truly an independent prohibition in IHRL on displacement caused by unlawful acts in the conduct of hostilities in IHRL, as claimed in other legal literature. Interestingly, the author focuses on the case law of the major African, Inter-American and European human rights bodies, in addition to the United Nations Human Rights Committee

and the United Nations Committee on Economic, Social and Cultural Rights, since there has not yet been a detailed examination of their 'jurisprudence' on conflict-driven or at least conflict-related displacement. The relatively limited amount of case law might make it difficult and perhaps too early to draw any definitive conclusions, but one cannot help but think that this article is a first important step in a larger study. It would indeed be very interesting to revisit this examination in the future to see whether case law has evolved in a clearer direction. If that proves to be the case, one should question how such developments might have an impact on (the relationship with) developing IHL.

A 'gap' in IHL is also the starting point of the article written by Peter Vedel Kessing. This author departs from the observation that hard IHL has not developed thoroughly over recent decades, which has resulted in many challenges and obscurities. Against this background, a number of soft-law instruments have been drafted that are meant to regulate certain aspects of armed conflict and may offer much-needed detail, clarification and guidance for both States and soldiers. The purpose of his contribution is to briefly analyse a number of soft-law instruments, which he describes as international instruments, other than treaties, that contain principles, norms, standards or other statements of expected behaviour, that have been developed by the ICRC, groups of experts and/or States, that have a general and universal bearing and that are often focused on areas of armed conflict or the behaviour of armed troops that States themselves have not regulated in a thorough and specific manner. He also examines to what extent IHRL is reflected in these instruments. He concludes, rather provocatively, that such instruments might be seen as norm-excluders rather than norm-creators, as many of the documents examined deliberately do not refer to IHRL. His provocative stance might resonate as a challenge for drafters of such soft law instruments to hear his call when creating new manuals or policies or revisiting existing guidelines and not to set the IHRL perspective aside, but fully incorporate it into their work. Indeed, in practice knowing that one is acting in accordance with IHL, but having no clear sign as to whether IHRL is also respected or might be a more appropriate legal framework to be applied to a specific issue, still leaves ample room for doubt, discussion and legal uncertainty.

Focusing on the jurisdictional uncertainty identified by Henckaerts and Nohle, the article by Ka Lok Yip provides a thoughtful examination of the different concepts of human rights that she argues lie behind different approaches to jurisdiction in academic doctrine. Deconstructing jurisdictional positions based on legitimacy, she warns that defining jurisdiction narrowly as a sovereign-subjects relationship is not only unnecessary but also risks letting non-sovereign actors such as armed non-State actors and States acting extraterritorially off the hook. She also critiques recent proposals to limit jurisdiction to negative rights when a State is acting extraterritorially with limited control, highlighting that such an approach risks what she calls the 'humanitarisation' of human rights law. In particular, she argues that it risks diluting

human rights law's unique ability to address structural conditions and recognise that violations can be made up of a complex web of omissions and actions, including at a procedural level. Recognising that her position will surely provoke further reflection on the topic, Ka Lok Yip ends her article by encouraging those who caution against overstretching the boundaries of IHRL to reply by *inter alia* justifying the lack of accountability that follows from their position.

In a final thought-provoking article, Ezequiel Heffes and Annyssa Bellal explore the role that the consent of armed groups plays in the process of creating norms binding upon them. Examining the existing theories of how armed groups are bound by IHL and IHRL, they argue that there is a good case for arguing that armed groups should participate in the formation of norms binding upon them. In a contribution designed to stimulate further thought on the issue, Heffes and Bellal conclude by putting forward some suggestions on how the practice of armed groups could be taken into account formally from a methodological perspective, as well as identifying some obstacles that this could provoke. Their contribution should surely cause further reflection on the matter, and require consideration, for example, of the extent to which the system of customary international law, and the principles of unity on which it is based at a constitutive level, has capacity to accommodate diversity at the level of norm-making. Perhaps it will also prompt reflection on how, as a matter of method, one can weigh the practice of States vis-à-vis the practice of armed groups when considering principles such as 'consistency' or the 'specially affected' test which are central to the making of custom.[6]

In reviewing these articles, several observations come to the fore. Decades into the debate, one feels that much ground has been covered, but that at the same time fundamental questions are still being debated – be it on new levels or from fresh angles – on new terrain, bringing about new queries. One noteworthy observation pertains to the shift, as mentioned above, from a purely theoretical debate to a problematic reality that needs – and has received – handling on a practical level. An interrelated observation is that IHL still retains many gaps, uncertainties and issues that need, but have not always received, attention, let alone answers – and for which often IHRL is put forward as a mirror or relied upon as a source of inspiration. The combination of these two factors have led to IHRL-driven development of IHL due to operational needs, in particular via human rights initiatives. In sharp contrast with IHRL, IHL indeed seems to be developing at a much slower pace, with States maintaining tighter control over the legal framework. As a result, hard IHL is only slowly expanding in the form of custom or interpretation of existing treaty norms and remains a terrain of frequent contestation. That said, one has the impression that the rapid development of IHRL actually seems to be pushing forward the evolution of IHL, forcing discussions of points internal to IHL that may not otherwise have arisen.

6 ICJ 20 February 1969, North Sea Continental Shelf, Judgment, www.icj-cij.org/files/case-related/51/051–19690220-JUD-01–00-EN.pdf (visited on 7 May 2018), para. 74.

Partly, this movement can be attributed to the fact that human rights mechanisms are accessible to individuals, whereas IHL lacks such clear oversight and complaint structures.

Ironically, the very fact that human rights bodies have so often had to adjudicate issues pertaining to the relationship between the two bodies of law is a direct consequence of the fact that States have not created a system whereby victims of IHL violations can access an individual remedy within that framework of law. As such, as several authors have noted, progressive developments in human rights law – and its interaction with IHL and conflict situations – have actually come about through the inaction of States. Equally, States' failure to recognise that human rights law applies extraterritorially and their decision not to derogate have forced human rights case law to develop in a direction in which it might not have otherwise gone. For example, the European Court of Human Rights recently noted in the case of *Hassan* in 2014 that a derogation is not necessary to render a deprivation of liberty in an international armed conflict (IAC) Article 5 ECHR compliant, provided that it complies with IHL on the taking of prisoners of war or civilians who pose a security threat, and that it is in keeping with the fundamental purpose of Article 5, 'which is to protect the individual from arbitrariness'.[7] One is struck by the paradox that as a result of States wishing to retain control of the legal frameworks, they have ultimately had to relinquish more control over them and allow them to develop partly in a bottom-up organic manner, rather than by explicit design.

Another aspect that stands out in the recent legal literature, in particular also in the contributions in this journal, is the fact that the 'general' debate on the relationship between IHRL and IHL has branched out into more specific fields, now focusing on very specific topics or interrelated legal frameworks, further highlighting the all-encompassing impact of the discussion. Although not covered in this issue, the relationship between IHRL and IHL in the e-environment, in particular when talking of 'cyberwarfare', is a prime example. The impact of the discussion on ICL, and the impact of ICL on the discussion, as illustrated inter alia by Rogier Bartels's article, is another. In particular, several such developments and discussion points seem to be driven by new patterns of armed conflict. Non-international armed conflicts (NIACs), for instance, or hybrid conflicts now seem to be the norm, far more so than classic IACs – putting armed groups squarely on the agenda. States acting extraterritorially – on an individual basis or as part of an international effort – have forced an examination of their obligations, in particular where the (local) 'territorial' legal and judicial framework is murky, insufficient or deficient. The development of new technologies and the very rapid evolution of aspects of warfare is also constantly forcing the legal framework to 'catch up' in ground-breaking domains and/or in creative ways.

7 ECt.HR (GC) 16 September 2014, Hassan v. the UK, Judgment, echr.coe.int/echr (visited on 18 April 2018), para. 105.

New socio-political phenomena, such as the (new) surge in radical terrorism, which is not limited to one specific area but has a clear and direct impact on societies and their legislation around the globe, also necessitate scrutiny and a revisiting of the existing legal frameworks. The struggle to deal with 'foreign terrorist fighters' – and their families – is but one example where in fact the human rights debate on terrorism (in particular the relationship between IHL/armed conflicts and IHRL/terrorism) spurs general controversy. Growing research agendas from other more empirical, field-research-based academic fields (e.g. rebel governance) – and more dialogue between the academic fields – will likely be key drivers of future legal scholarship, forcing an evaluation of how and whether the legal framework sufficiently takes into account realities on the ground.

Indeed, as we reflect on the relationship between IHL and IHRL today, it is clear that there are many more key issues that remain uncertain and require further examination and study than those that have been touched upon by the contributions in this volume. They include the uncertainty about how detention should be handled in NIACs; the next phase of cyber and modern warfare, in particular with the rapid progression in the development of AI – issues that only a decade ago seemed pure science fiction; the treatment of own forces under IHL or IHRL; the human rights obligations of States conducting airstrikes; the interface of the two bodies of law in complex and hybrid peacekeeping situations; and the transitional justice framework, where there are specific emerging questions relating to guarantees of non-repetition. A lot of work is thus still left to be done. With this special edition of the journal, we hope to revitalise the debate and invite (incite!) scholars and practitioners around the world to continue their pioneering and crucial work in this field.